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THE RIGHT OF A LANDOWNER TO OIL AND GAS IN HIS LAND.

From the time when petroleum first became commercially valuable the courts have had to meet the question, what rights does or can anyone have in natural oil before it has been taken from the land. The same question has called for solution in the case of natural gas and it has been tacitly assumed that these questions are identical.

At times a court has sought to reach a definition, or, at least a description of the nature of the right which a landowner has to the liquid and volatile substances which can be brought into physical control through the surface of his land. If the discussion of the question could be confined to the cases in which this general proposition has been considered, there would be no difficulty in formulating an answer, rational and certain; but, unfortunately there are times when the courts, either because they have not had time to consider or because counsel have failed to present the fundamental proposition involved in their cases, reach conclusions which seem to justify the inference that they are indifferent to the existence of the primary division of things physical into solid, liquid and gaseous. But whatever the cause, there are many judicial utterances so inconsistent with the con-

clusions reached in the cases where the nature of the right in question has been given careful consideration that a great confusion has resulted. The object of this article is to clarify the subject, first by inquiring what the nature is of the right that the landowner can have in oil and gas while still confined to the natural reservoir beneath his surface and then by drawing some necessary inferences therefrom.

Some things are clearly established. It is established that by boring a well or causing a well to be bored upon his land the landowner becomes the owner of all the oil which may be brought to the surface through this well; and although a stranger at his own labor and expense takes oil from this well, it is, nevertheless, when brought to the surface, the property of the landowner.¹ It is established that if oil or gas escape by its own force from such a well, one who is not the landowner but who is lawfully in possession of the land, may appropriate it, and upon such appropriation it becomes his property.² It is likewise established that the landowner has a right to an unlimited production through the well which has been sunk upon his land and in the exercise of that right he may diminish or exhaust the supply of the wells of his neighbors, and conversely, the exhaustion or diminution of his supply by operations upon other lands does not, standing alone, furnish him any ground of legal or equitable redress.³

While, therefore, all oil or gas, whatever its source, which has been brought to the surface is the property of the owner of the land through whose surface it is brought, he, nevertheless, cannot so long as he has not brought it within his control by sink-

¹ *Hail v. Reed*, 15 B. Mon. 479 (Ky. 1854); *Hughes v. United Pipe Lines*, 119 N. Y. 423 (1890); *People's Gas Co. v. Tyner*, 131 Ind. 277 (1891).

² *Kier v. Peterson*, 41 Pa. 357 (1861); *Wood County Petroleum Co. v. West Virginia Transportation Company*, 28 W. Va. 210 (1886). In the latter case it is also held that such an appropriation of gas may be made by a trespasser.

³ *People's Gas Company v. Tyner*, 131 Ind. 277 (1891); *Andrews v. Andrews*, 31 Ind. App. 189 (1903); *Hague v. Wheeler*, 157 Pa. 324 (1893); *Kelley v. Ohio Oil Co.*, 57 Ohio, 317 (1897); *Hathorn v. Natural Carbonic Gas Company*, 194 N. Y. 326 (1908). Redress may be had only when the supply of oil or gas is deliberately wasted for the purpose of inflicting injury. *Louisville Gas Company v. Kentucky Heating Company*, 117 Ky. 77 (1903); *Id. v. Id.*, 33 Ky. Law Rep. 912 (1908); *Hathorn v. Natural Carbonic Gas Company*, *supra*.

ing a well, indicate any body of gas or oil which has a permanent *situs* in his land. Whatever oil or gas may be there is not only subject to removal by natural agencies, but is subject to being drawn off and appropriated by other landowners. Now, as has been pointed out by Mr. Chief Justice White, "it cannot be that property as to a specified thing vests in any one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property".⁴ It therefore follows that the landowner, who has not sunk a well has no right *of property* in any oil or gas in or under his land.

What right then does a landowner have to the oil and gas in his land which a stranger does not have? The first discussion of this question appears in *Hail v. Reed*.⁵ In this case the defendants had at their own labor and expense taken oil from a well on plaintiff's land. In an action to recover this oil, plaintiff prevailed. One ground of defence was that the oil in suit had been "taken from a well bored down to a running stream of oil, which was vague and fugitive, and had not been confined nor ever reduced to possession, nor even in possession of plaintiffs". It was sought to support this contention by drawing an analogy between oil and water, which Blackstone says must unavoidably remain in common, susceptible only of a usufructuary property, belonging to the first occupant during the time he holds possession and no longer. The court held that these observations applied only to water found running upon the surface of the earth and not to water running from a spring or in the bottom of a well, which are the property of the owner of the soil.

"We know that in wells for drawing water it is usual, and where the supply is small, necessary, to sink the well below the point where the water enters it, so that it may be retained there in sufficient quantities for use, and for drawing it up. There is nothing to show that this was not the case in the present instance, and the jury might have so found. But we are of opinion that whether the water or oil is running through the well in a stream or not, that which is actually in the well is, while it is there and subject to be drawn out, though it be there only in passing from one side of it to the other, appropriated by the

⁴ *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 201 (1900).

⁵ 15 B. Mon. 479 (Ky. 1854).

owner to his own use, and belongs to him when it is drawn out, unless this is done by his license and for another's use. If, as may be presumed, the well is sunk below the point at which the water or oil enters, or if the water or oil, in any quantity, stands in it until drawn out, the evidence of appropriation is still stronger, and the right of the owner more easily established. And in either case the water or oil, if drawn up by a wrongdoer, is the property of the person entitled to the well, or its exclusive use, and may be specifically recovered."

We thus find the thought in the mind of the court to be that the landowner's property in the oil came from appropriation only, and that the sinking of a well was the appropriation of so much as remained in the well or was brought to the surface through it.

In the earliest Pennsylvania cases, the importance of settling this fundamental question seems not to have been appreciated. Although a reference to it is to be found in the argument of counsel in *Funk v. Haldeman*,⁶ Mr. Chief Justice Woodward concludes his elaborate opinion in that case with the statement that he has treated oil as a mineral,⁷ and that until our scientific knowledge on the subject was increased, the courts would be very likely to regard this valuable production of the earth in that light. Nevertheless, in the following year we find Mr. Justice Strong⁸ saying, "Oil is a fluid, like water, it is not the subject of property except while in actual occupancy".⁹

The next discussion of the subject appears in a case in West Virginia¹⁰ in which it was decided that a lessee of a tract of land "for the purpose of mining and excavating for rock or carbon oil" and "for said purpose only" was entitled to take and use natural gas which came to the surface through the oil well. The court reasons thus:

"While the grant is for the specific purpose of mining for and removing carbon oil and for none other, still there is neces-

⁶ 53 Pa. 229 (1866).

⁷ He held the same view in his dissenting opinion in *Kier v. Peterson*, 41 Pa. 357 (1861).

⁸ *Dark v. Johnston*, 55 Pa. 164 (1867).

⁹ This language is repeated in *Shepherd v. McCalmont Oil Co.*, 38 Hun, 37 (N. Y. 1885).

¹⁰ *Wood County Petroleum Co. v. West Virginia Transportation Co.*, 28 W. Va. 210 (1886).

sarily included in this grant all the incidents essentially or naturally pertaining to its enjoyment. Included in these are the elements, such as light, air and water. And having the legal right to enter upon and occupy any portion of the premises the appellant could, without becoming a trespasser or incurring any liability to the lessors, use and appropriate anything it might find thereon, which is not the property of another, such as animals *ferae naturae*, or waters percolating through the land, even though by such use and appropriation it may deprive another, having an equal right, of the power to do so. These are not the subject of absolute property, and being therefore *jure naturae* capable of a qualified ownership only, they belong to him who first appropriates them."

This conclusion is enforced by a thorough and exhaustive consideration of the physical character of this natural product and its capacity of flowing from place to place of its own accord. It is pointed out that, it not being ascertainable from the pleadings whether the plaintiff sought to recover from the defendant as an occupant of the premises by reason of the lease or to hold him as a trespasser, the result is the same in either case.

"If, as before stated, this gas was not susceptible of absolute ownership but the subject of qualified property only, as there can be no title or right to such property except by possession or appropriation, the plaintiff not having the possession could have no property in it, and consequently could not legally claim compensation therefor from the appellant."

In the meantime the courts of Pennsylvania assumed that the fact that oil was a mineral, as had been stated by Mr. Chief Justice Woodward, was sufficient to justify the decision of questions arising in connection with oil leases upon precedents drawn from the law applicable to leases of the solid minerals. It was in consideration of this circumstance and no doubt having before him the discussion in the opinion in *Wood County Petroleum Company v. West Virginia Transportation Company* that Mr. Justice Mitchell delivered his opinion in the case of *Westmoreland Natural Gas Company v. DeWitt*,¹¹ where he said:

"The real subject of possession to which complainant was entitled under the lease was the gas or oil contained in, or ob-

¹¹ 130 Pa. 235 (1889).

tainable through, the land. The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, *etc.*, have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in *Brown v. Vandergrift*.¹² They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

These observations have become classical and have generally been accepted throughout the oil producing states. For the next ten years the discussion of the subject in judicial decisions consisted mainly in reiteration of what Mr. Justice Mitchell had said in that case and this led the court in *Jones v. Forest Oil Company*¹³ to conclude "that the property of the owner of lands in oil or gas is not absolute until it is actually in his grasp and brought to the surface".

Nothing was added to the discussion until the decision of the Supreme Court of the United States in *Ohio Oil Company v. Indiana*,¹⁴ in which it was decided that a statute of the State of Indiana making it unlawful for any person, firm or corporation having possession or control of any natural gas or oil well to permit the flow of gas or oil therefrom to escape into the open air

¹² 80 Pa. 147, 148 (1875).

¹³ 194 Pa. 379 (1900).

¹⁴ 177 U. S. 190 (1900).

without being confined within such well, pipes or other safe receptacle, for a period longer than two days, was not a violation of the provisions of the Fourteenth Amendment to the Federal Constitution. In this case, Mr. Justice White (the present Chief Justice) pointed out that the analogy that had been drawn in the DeWitt case between oil and gas and animals *ferae naturae* failed in one particular, for while in the case of things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession, in the case of oil and gas this power is limited to the owners in fee of the surface of the land within the area of the gas field. In the one case, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession without divesting any one of private property. In the other, the landowners could not be absolutely deprived of their rights without a taking of private property.¹⁵ This right, however, is a co-equal right in them all to take from a common source of supply the two substances which in the nature of things are united although separate.¹⁶ After an exhaustive consideration of the cases that had arisen in Indiana, the court found that they, in accord with the rule of general law, settled the rule of property in the State of Indiana to be as follows:

"Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."¹⁷

¹⁵ See also *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 461 (1900).

¹⁶ This idea is developed in *Louisville Gas Co. v. Kentucky Heating Co.*, 33 Ky. Law Rep. 912 (1908). "The right of the surface owners to take gas from the subjacent fields or reservoirs is a right in common. There is no property in the gas until it is taken; before it is taken it is fugitive in its nature, and belongs in common to the owners of the surface." See also *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 77 (1903).

¹⁷ That this is a correct statement of the law of that State is shown by the subsequent cases, *Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25 (1905); *New American Oil and Mining Co. v. Troyer*, 166 Ind. 402 (1906).

This statement of the rule is reiterated in *Lindsley v. Natural Carbonic Gas Company*,¹⁸ where Mr. Justice Van Devanter said that "each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession".

We now have two statements of the nature of the right which a landowner has to the oil and gas underlying his land. According to the Supreme Court of the United States he has not a property right but a right through his surface to reduce the oil or gas to possession and thus acquire title to it. According to the Supreme Court of Pennsylvania he has no absolute property to these substances in the ground but they belong to him as a part of the land so long as they are on or in it and subject to his control. It seems to the writer that the ideas expressed are identical; that the difference in expression arises from the fact that the federal court is speaking of the right which the landowner has before he has bored a well and struck the oil or gas, and the Pennsylvania court is speaking as of the time after he has done so.¹⁹ In other words, the expression in *Westmoreland Natural Gas Company v. DeWitt*,²⁰ "subject to his control", is the equivalent of the expression "reduced to actual possession" used by the Supreme Court of the United States.

While this rule was being developed, however, a discordant note had been struck by the Supreme Court of West Virginia in *Williamson v. Jones*,²¹ where, with the DeWitt case before it, it decided that oil is a mineral and being a mineral is part of the realty like coal or any other natural product which *in situ* forms a

¹⁸ 220 U. S. 61 (1911).

¹⁹ "Tested by these principles, there is not the slightest doubt that the possession of the gas, as well as the right to it under this lease, was in the complainants when the bill was filed. They had put down a well, which had tapped the gas-bearing strata, and it was the only one on the land. They had it in their control, for they had only to turn a valve to have it flow into their pipe, ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill-owner affects the continuance of his water-right when he shuts his sluice-gates."

²⁰ 130 Pa. 235 (1900).

²¹ 39 W. Va. 231 (1894).

part of the land.²² In reaching this conclusion the court says that it does not understand that *Wood County Petroleum Company v. West Virginia Transportation Company* lays down a different doctrine even as to natural gas when it is confined in the *strata* where it is found, but that the landowner's right to property in that substance is only lost when it escapes out of his possession, and the court seems to regard gas while in the land or under the land as *ipso facto* subject to the owner's control.²³ The conclusion, therefore, is that the owner of undeveloped land owns,—has a right of property in,—the oil and gas which may be in or under his land.

The West Virginia rule seems indefensible on any reasonable ground. It conceives the possibility of a person having a property right in a thing of which another may lawfully at will deprive him. This attributes ownership to a state of facts which is a denial of an essential element of property.²⁴ This result is reached not by a mere failure to observe the consequences of the conclusion reached, but by a deliberate identification of things which are essentially different. Coal and iron are minerals; oil and gas are minerals. Therefore, concludes the court, as the subject of property rights there can be no difference between them. But the fact that they are minerals does not affect the question to

²² *Wilson v. Youst*, 43 W. Va. 826 (1897); *Williamson v. Jones*, 43 W. Va. 562 (1897); *South Penn Oil Co. v. McIntire*, 44 W. Va. 296 (1898).

²³ In this view, the expression "subject to his control" used in the *DeWitt* case is treated as in apposition to "in or under the land", and not as an additional qualification. It is submitted that this is not a reasonable interpretation of the language of the court. Currency has been given to his erroneous interpretation and to the conclusions that have been drawn from it by the decision of Mr. Justice Shiras in *Brown v. Spilman*, 155 U. S. 665 (1895), who in paraphrasing the language of Mr. Justice Mitchell has changed the word "and" to "or". In that case this seems to have been a slip of the pen, but the error has been perpetuated by the quotation of his language in *Lanyon Zinc Co. v. Freeman*, 68 Kans. 691 (1904), and partially at least explains the disposition of the courts of that State to follow the West Virginia doctrine as explained below.

²⁴ "For ownership, as the entirety of legal powers of use and disposal, must include, as the one thing by which alone the rest can be made effective, the right to maintain or claim possession; a right which, though it may be suspended or deferred, cannot be wholly dissociated from an owner's relation to the thing owned." Pollock, *First Book of Jurisprudence*, 169. The owner's "right is in general that the object shall neither be taken away from him, nor impaired in value, nor shall his title to it be weakened." Holland, *Jurisprudence* (6th ed.) 182.

be determined, which is, whether they are a permanent part of the land. That the solid minerals while in place are so is clear. That the liquid and gaseous minerals are not so becomes equally clear, when it is admitted that they may be withdrawn from the land against the owner's will, either by natural forces or by human agencies exercised on other land.

The view of the Pennsylvania and federal courts therefore, as developed above, furnishes the only rational answer to the inquiry which was propounded at the beginning of this paper, namely, what is the nature of the right that the landowner can have in oil and gas while still confined in the natural reservoir beneath the surface. The answer is that he has the exclusive right on his own land to seek the oil and gas in the reservoir beneath; until he has by boring a well struck oil or gas he has no property in them either separately from or as a part of the land; when he has drilled a well through which they may find their way or be brought to the surface then they are his property so long as they are in the land and subject to his control.

Having determined what right the landowner can have in oil and gas in the earth, it should be a simple task to determine what right to such oil and gas he can convey. This is a corollary to the first proposition and its expression must be a direct deduction from the solution of that proposition. This subject, however, has by the decided cases been involved in considerable confusion because the courts have repeatedly sought to determine what rights have been conveyed without giving any consideration to the primary question of the nature of the rights possessed.

If the landowner's right is only the right to explore and, when oil or gas is found, reduce it to possession, it necessarily follows that he cannot transfer to another any greater right. The right which he has he can transfer either by itself, or as an appurtenance to a conveyance of the land, or an interest or a limited estate in the land, but he cannot convey the oil and gas or either of them as corporeal things in place beneath the surface. The division of *strata* of solid minerals from the overlying and underlying soil, and the conveyance of such *strata* separately as

land; the creation of a separate estate in such minerals as land distinct from the estate in the surface; these are things long familiar to the law. But, if the landowner's right to underlying oil and gas is only the right to search for them and when found appropriate them, no such conveyance can be made of these minerals, no separate estate in them as land can be created. The courts of the oil producing states, except West Virginia and Kansas, have, after some vacillation reached this conclusion.

This subject was first considered in the case of *Dark v. Johnston*.²⁵ The instrument under consideration in that case passed no present estate either corporeal or incorporeal and the action of ejectment which the plaintiff had brought could not have been sustained even if its subject had been an interest in solid minerals. It was argued, however, by counsel that the instrument amounted to a sale of the oil itself and that oil being a part of the land was a corporeal hereditament, to recover possession of which, ejectment would lie. On this subject Mr. Justice Strong said:

"Oil is a fluid, like water, it is not the subject of property except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests. . . . It would confound all legal notions were it held that an action can be maintained for the recovery specifically of the possession of a subterranean spring or stream of water, no matter whether the waters are mineral or not. There is a manifest difference between a grant of all the coal or ore within a tract of land, or even the grant of an exclusive right to dig, take and carry away all the coal in the tract (which we held in *Caldwell v. Fulton* to be a grant of a corporeal interest), and a grant of the waters in or on the tract. The nature of the subject has much to do with the rights that are given over it, and to us it appears that a right to take all the oil that may be found in a tract of land, cannot be a corporeal right."

Notwithstanding this plain statement of the law, Mr. Justice Gordon in *Stoughton's Appeal*,²⁶ basing his opinion upon the *dictum* in *Funk v. Haldeman*, held that oil is a mineral and

²⁵ 55 Pa. 164 (1867).

²⁶ 88 Pa. 198 (1879).

being a mineral is part of the realty and that in this it is like coal or any other natural product which *in situ* forms part of the land and "whenever conveyance is made of it, whether that conveyance be called a lease or a deed, it is in effect the grant of part of the corpus of the estate and not a mere incorporeal right. In the case above cited, [*Funk v. Haldeman*], this is said to be so as to leases of coal land for the purpose of mining, and there is no reason why the same doctrine should not apply to oil leases." It is clear that the reasoning in *Dark v. Johnston* had not been brought to the attention of the court. However that may be, the court could have decided the point at issue in *Stoughton's Appeal* without resorting to its extreme statement as to the nature of the estate conveyed. The point decided was that a guardian under his ordinary powers to lease his ward's property could not lease a piece of real estate for the term of twenty-one years for oil purposes without the approval of the Orphans' Court. This was precisely such a lease as those which were before the same court in *Duke v. Hague*²⁷ and *Brown v. Beecher*,²⁸ in which the lessee was held to take an estate for years in the land for the purpose of mining. "He is not an absolute owner of the whole of the oil, as he would be were all the oil in place conveyed to him in fee." While, therefore, the Pennsylvania court at that time in terms recognized the possibility of a conveyance of oil in place as land, the lease in *Stoughton's Appeal* was not such a conveyance.

Nevertheless, after the decision in *Stoughton's Appeal*, there was a persistent opinion on the part of the Bar of Pennsylvania, which was shared by the Bench, as is illustrated in the above quotation from *Duke v. Hague*, that property in oil in place no wise differed in nature from property in the solid minerals, and that a conveyance of oil in place as a corporeal thing was not obnoxious to the law. This opinion persisted notwithstanding the views of Mr. Justice Mitchell as expressed in *Westmoreland Natural Gas Company v. DeWitt*.²⁹ His illumi-

²⁷ 107 Pa. 57 (1884).

²⁸ 120 Pa. 590 (1888).

²⁹ *Hague v. Wheeler*, 157 Pa. 324 (1893); *Cassell v. Crothers*, 193 Pa. 359 (1899).

nating sentences however began to bear fruit in *Greensburg Fuel Company v. Irwin Natural Gas Company*.³⁰ In this case there had been excepted and reserved from the operations of a grant of a tract of land "the gas well upon the said premises and all the materials and machinery therewith, and regress and egress to and from the same, and *all the natural gas in and underlying the said tract or piece of land* aforedescribed, and all the gas rights and privileges necessary or useful in the production and transportation of the said gas therefrom." The rights under this reservation having vested in the Irwin Natural Gas Company, a special writ of *feri facias* under the Act of April 7, 1870, was issued against this company under which was sold all of its property, franchises and rights except land held in fee. The court held that the oil rights in question were not land held in fee because the exception in the Act of April 7, 1870, was limited to lands not dedicated to corporate purposes or essential to the exercise of the corporate franchises, but independently of this, the court said that there were other considerations which confirmed its view.

"These arise from the nature and quality of the property mortgaged. A right to take gas from the land or water from the spring of another for private use or consumption is not land held in fee and the appliances and privileges necessary to the enjoyment of the right are not."

Finally in 1906 a case reached the Supreme Court of this State in which the question under discussion was squarely met.³¹ Keys, being the owner of a tract of land, granted to Kelly the exclusive right to mine and produce therefrom petroleum and natural gas, with possession of so much of the land as might be necessary for such purposes, for a term of two years. Kelly having exercised no rights under the grant and not having entered into possession, Keys conveyed a like right to others against whom Kelly brought ejectment. The court below held that the action would lie. This was reversed by the Supreme Court. Mr. Justice Stewart in delivering the opinion said:

³⁰ 162 Pa. 78 (1894).

³¹ *Kelly v. Keys*, 213 Pa. 295 (1906).

"In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of *Funk v. Haldeman*,³² and the cases that follow it, wherein it is held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, as in this case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament. This court has found frequent occasion to assert its continued adherence to the doctrine of these cases. Only recently, in the case of *Hicks v. American Natural Gas Company*,³³ it reasserted it without qualification. Once it was determined that the subject of such a grant was an incorporeal hereditament, and not an estate in the land or oil, it logically and necessarily resulted that it would not support an action in ejectment. And this view has been steadily adhered to. In no case has ejectment been sustained under such a grant, except where possession has been acquired by the grantee, and he had been wrongfully disseised."

"In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil; so much as is thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant; as to all not produced there is no change of property. It is expressly so ruled in *Funk v. Haldeman*,³⁴ and the same ruling was repeated and emphasized in the case next following on the same subject, *Dark v. Johnston*.³⁵ These were the first cases in which grants of rights to explore for oil were considered and passed upon by this Court."

"The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed *situs* and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil *in situ* has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that the mineral once discovered, all that was *in situ* became in law part of the real estate."

³² 53 Pa. 229 (1866).

³³ 207 Pa. 570, 57 Atl. Rep. 55, 65 L. R. A. 209 (1904).

³⁴ *Supra*, n. 32.

³⁵ 55 Pa. 164 (1867).

This opinion fixes the law of Pennsylvania.³⁶

The question has presented no difficulties to the courts of New York. This was to be expected of the State whose courts have decided³⁷ that the rule in *Caldwell v. Fulton*³⁸ was to be limited to cases in which by the terms of the agreement and the contemplation of the parties the whole body of mineral

“considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land, and severed as land from the estate of which it forms a part.”

Of course, the fugitive minerals cannot answer this description. In *Shepherd v. McCalmont Oil Company*³⁹ under an agreement by which was conveyed the exclusive right to mine, bore or excavate for oil or other valuable volatile or mineral substance, and to carry on mining to such an extent as it might be deemed advisable, it was held that the grantee did not take a corporeal hereditament and that title in fee to the oil in place did not pass to him. “We do not understand that there can be any property in rock or mineral oil, or that title thereto can be divested or acquired until it has been taken from the earth.”⁴⁰

In Indiana the essential difference between the nature of the property which can be had in natural oil and gas and that which can be had in the solid minerals has been always recognized.⁴¹ The clearest and most positive statement of the doctrine under consideration is contained in the case of *Heller v. Dailey*.⁴² The question in this case was whether a grant of all the oil and gas in

³⁶ The Superior Court in *Hutton v. Carnegie Natural Gas Co.*, 51 Pa. Super. Ct. 376 (1912), disregarding the latest decision of the Supreme Court, reiterated the language of Mr. Justice Gordon in *Stoughton's Appeal*. The question was not necessarily involved in this case, but at any rate, until the Supreme Court retracts the reasoning in *Keys v. Kelly*, the decision of the Superior Court cannot be accepted as an authority.

³⁷ *Genet v. Delaware & Hudson Canal Co.*, 136 N. Y. 593 (1893).

³⁸ 31 Pa. 475 (1858).

³⁹ 38 Hun, 37 (N. Y. 1885).

⁴⁰ See also *Wagner v. Mallory*, 169 N. Y. 501 (1902).

⁴¹ *Columbian Oil Co. v. Blake*, 13 Ind. App. 680 (1895); *Chandler v. Pittsburg Plate Glass Co.*, 20 Ind. App. 165 (1898); *State v. Ohio Oil Co.*, 150 Ind. 21; *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402 (1906).

⁴² 28 Ind. App. 555 (1902).

and under a tract of land unlimited as to time constituted a conveyance of an interest in land within the meaning of the Statute of Frauds. The court said:

"By its terms the contract is a grant of the minerals in and under the land. If by such general terms all of a specified solid mineral, as coal, in and under the land were granted, it would be a grant of real estate . . . ; but, because of the fluidity and fugitiveness of petroleum and natural gas, the absolute ownership of these mineral substances within the land cannot be acquired without reducing them to actual control, so that a distinction must be and is made between these elusive minerals in and under the ground and the solid minerals in place in the earth. Therefore, a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance as would be a grant of the coal in and under certain land.

"The owner of land is not by virtue of his proprietorship thereof the absolute owner of the oil and gas in and under it, in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through and under his land (as making of wells) necessary to reduce the minerals to his possession, and, by thus acquiring the exclusive control, to become the owner of the mineral substances as his personal property, observing due regard in his operations to the like enjoyment of such exclusive right by all other landowners in like circumstances. This exclusive right is his private property. He cannot grant more than he owns; therefore, by granting all the oil and gas in and under his land, he does not grant more than a right to reduce to ownership the oil and gas which may be obtained by operating on the land, whereby substances which, at the time of the making of the grant, may be in and under lands of other surface proprietors, may come into rightful ownership of the grantee as his personal property."

This doctrine also obtains unqualified adoption by the courts of Illinois. In *Watford Oil and Gas Company v. Shipman*⁴³ it is held that these minerals are not capable of distinct ownership in place.

"Oil and gas while in the earth, unlike solid minerals, cannot be the subject of a distinct ownership from the soil. A grant to the oil and gas passes nothing which can be the subject of ejectment or other real action. It is a grant not of the oil which is in the ground but to such part thereof as the grantee may find."⁴⁴

⁴³ 233 Ill. 9 (1908).

⁴⁴ See also *Keller v. Ullery*, 233 Ill. 56 (1908).

The precise question has not arisen, so far as the writer has been able to find, in Ohio, but as the courts of that State have adopted the view that these fugitive minerals belong to the person who reaches them by means of a well and severs them from the realty and converts them into personalty and that no one else can have ownership in them,⁴⁵ the writer feels justified in ranging this State along side of Indiana and Illinois.

In Oklahoma also it is held that oil and gas while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil and a grant of them is a grant not of the oil and gas that are in the ground but of such part as the grantee may find and reduce to possession, and passes nothing that can be the subject of ejectment or other real action.⁴⁶

In West Virginia, on the other hand, it has been consistently held since the decision in *Williamson v. Jones* that no legal distinction is to be drawn, in determining questions of ownership, between the solid minerals and the liquid and gaseous minerals.⁴⁷ In *Preston v. White* it is said:

"Oil and gas in place are a part of the land itself. But when the owner of land conveys to another the oil or gas, that oil or gas becomes a property distinct from the residue or remnant of the land; distinct from the 'surface', as the expression is in the books. The oil and surface are then two properties under distinct ownership, but the oil none the less a real corporeal property than the surface or soil itself. Being part of the land and thus owned by the owner of the land, he can sever its ownership. . . . When thus severed in ownership, the owners own two separate interests and are not co-tenants. When thus severed in ownership, the minerals become a separate corporeal hereditament, and their ownership is attended with all the attributes and incidents peculiar to ownership of land. Oil and gas are minerals and fall under these principles."

⁴⁵ *Kelley v. Ohio Oil Co.*, 57 Ohio, 317 (1897); *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio, 259 (1903).

⁴⁶ *Kolachny v. Galbreath*, 26 Okla. 772 (1910); *Duff v. Keaton*, 33 Okla. 92 (1912); *Priddy v. Thompson*, 204 Fed. Rep. 955 (1913).

⁴⁷ *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296 (1898); *Harris v. Cobb*, 49 W. Va. 350 (1901); *Lawson v. Kirshner*, 50 W. Va. 344 (1901); *Preston v. White*, 57 W. Va. 278 (1905).

The West Virginia cases have been followed in Kansas, whose courts have added nothing to the discussion.⁴⁸

Texas may be considered not positively to have declared itself, for, while in *Southern Oil Company v. Colquitt*⁴⁹ it was held that a conveyance of all the oil, gas, coal and other minerals in and under the homestead of the grantor and his wife was such a conveyance of a part of the homestead as required the joinder of the wife under the Texas statute, yet in *Bender v. Brooks*,⁵⁰ *Kelly v. Ohio Oil Company* is quoted with approval for the proposition that the owner of the land has no specific title to the oil therein until it has been removed from the earth.

In those states, therefore, which have recognized the true nature of the landowner's right to oil and gas in his land, as developed by the Supreme Court of Pennsylvania and by the Supreme Court of the United States, it is now held that he cannot convey a right greater than he has. His right in those substances not being a right of property, he cannot confer on others a property right in them. The clear apprehension of this necessary proposition has been interfered with in Pennsylvania by the persistent effect of the deductions which have been drawn by Bench and Bar from the language of the judges who delivered the opinions in *Funk v. Haldeman*⁵¹ and *Stoughton's Appeal*.⁵² It is the writer's opinion that these cases have at last been reduced to authorities only for the points decided by them, and that the West Virginia rule that oil and gas *in situ*, like the solid minerals, may be conveyed as land and a separate estate created in them as land apart from the surface now prevails only in West Virginia and Kansas.

If this contention is correct, the classification of those instruments which are indiscriminately known as oil and gas leases becomes much simplified. The landowner's right being

⁴⁸ *Moore v. Griffin*, 72 Kans. 164 (1905).

⁴⁹ 28 Tex. Civ. App. 292 (1902).

⁵⁰ 103 Tex. 329 (1910).

⁵¹ 53 Pa. 229 (1866).

⁵² 88 Pa. 198 (1879).

only a right to explore and appropriate, he may transfer this right either as an appurtenance to the conveyance of an interest in the land, or without conveying any interest in the land. Those instruments which effectuate the former purpose are true leases, that is, of the land. Those instruments which accomplish the latter purpose are grants of incorporeal hereditaments, licenses and options.

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